No. 12298

In The United States Court of Appeals

For the Ninth Circuit

ALASKA STEAMSHIP COMPANY, a Corporation
Appellant,

v.

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division

BRIEF FOR THE APPELLANT

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NOTE:

The relevant portions of the principal statutes involved (Act of March 26, 1949, Chapter 115, Session Laws of Alaska, 1949; and Sections 3 and 9 of the Act of Aug. 24, 1912, c. 387, 37 Stat. 512 and 514) are set out in the Appendix.

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court, as yet unreported, will be found at R. 44-60.

JURISDICTION

This is a suit to enjoin the appellee from enforcing the provisions of the Alaska Net Income Tax Act against appellant; to have declared invalid the provisions of the Act requiring appellant to withhold for income tax purposes upon the wages of its employees, including seamen; and to have declared invalid the Act in its entirety. Judgment and decree

was entered on July 8, 1949, sustaining the validity of the Act with certain exceptions, vacating a preliminary injunction and dismissing the complaint (R. 68). Petition for allowance of appeal was filed July 9, 1949, and order allowing appeal was signed July 9, 1949 (R. 70, 75). The jurisdiction of the district court was invoked under the Act of June 6, 1900, c. 786, §4, 31 Stat. 322, as amended, 48 U. S. C. A. §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED

1. Whether Chapter 115, Session Laws of Alaska, 1949, known as the Alaska Net Income Tax Act, imposing a net income tax, is a valid exercise of the taxing authority of the Territory.

2. Whether, if some provisions of the Alaska Net Income Tax Act are invalid, the remainder of the Act may be given effect.

SPECIFICATIONS OF ERROR

The assignments of error (R. 71) may be summarized as follows:

1. The court erred in finding that section 16 of chapter 115, Session Laws of Alaska, 1949, ratified and confirmed the withholdings of income taxes made pursuant to chapter 3 of the Laws of the Extraordinary Session, Alaska, 1949.

2. The court erred in finding that the term "continental shelf" as used in section 5-B (1) of chapter 115, Session Laws of Alaska, 1949, in the clause "including the waters over the continental shelf" may, under the severability provision of section 15

of the Act, be eliminated without affecting the remainder of the Act.

3. The court erred in its conclusion that the income tax withholdings made pursuant to chapter 3 of the Laws of the Extraordinary Session, Alaska, 1949, are valid under the provisions of section 16, chapter 115, Session Laws of Alaska, 1949.

4. The court erred in its conclusion that chapter 115, Session Laws of Alaska, 1949, is a valid Act.

5. The court erred in giving and entering an order, judgment and decree in favor of defendant and against plaintiff that chapter 115, Session Laws of Alaska, 1949, is a valid act, vacating the preliminary injunction granted by the court on April 28, 1949, and dismissing plaintiff's complaint.

STATEMENT

This action was instituted by appellant, a Washington corporation, on April 8, 1949, to enjoin the enforcement of chapter 115, Session Laws of Alaska, 1949, imposing a net income tax; to have declared invalid the provisions of the Act requiring appellant to withhold for income tax purposes upon the wages of its employees, including seamen; and to have declared invalid the Act in its entirety. (R. 2-36).

On January 22, 1949, an Extraordinary Session of the Alaska legislature enacted a net income tax law entitled Alaska Net Income Tax Act. This session was called by the Governor on January 6, 1949, and was composed in part of members elected at the general election in October, 1948, although the Organic Act for Alaska (Act of Aug. 24, 1912, c. 387, §1, 37 Stat. 512, 48 U. S. C. A. §21, *et seq.*) provides, in effect,

that each new legislature shall be constituted on, and convene, the fourth Monday in January in every odd-numbered year. Because of doubt respecting the validity of that session, subsequently, on March 26, 1949, at the regular session of the legislature the law was reenacted as chapter 115, Session Laws of Alaska, 1949, with certain changes which will later be noted, and this Act expressly repealed the Act of January 22, 1949, but by section 16 purported to ratify and confirm all administrative steps purported to be taken pursuant to the earlier Act and all withholdings of income tax from the wages of employees which were required to be made by the earlier Act.

Appellant is engaged in the operation of a line of vessels transporting freight and passengers between Seattle, Washington, and ports in Alaska in interstate commerce, including such outports as salmon canneries located in the Territory. In this trade appellant was operating 12 vessels, manned by 706 seamen, who were nonresidents of Alaska, at the time this case was tried, with an operating schedule of four sailings a week from the Port of Seattle to the Territory of Alaska. Additional ships, sailings and seamen are scheduled during the summer months. Approximately 75% of the elapsed time on the voyages of appellant's vessels is spent in the territorial waters of Alaska and in waters off-shore from the coast of Alaska but outside of the territorial waters (R. 84, 85).

The vessel personnel are members of various unions, including the Sailors' Union of the Pacific, and all seamen serving on vessels of appellant, including all

deck crews, are employed under union contracts and are paid off in Seattle at the end of each voyage, payment being computed according to the union scale and the union contract (R. 85, 86).

Immediately after the enactment of the Act of January 22, 1949 (the first Alaska Net Income Tax Act), appellant began withholding income taxes from the wages paid to all of its employees who performed services in Alaska, in accordance with the withholding requirements of the Act. This included withholdings with respect to vessel personnel, 19 resident Alaska employees, and some Seattle resident shore employees who made extended trips to the Territory on company business (R. 87).

Deeming themselves aggrieved by these withholdings, the employee members of the Sailors' Union of the Pacific on February 4, 1949, obtained an injunction from the United States District Court for the Western District of Washington, Northern Division, in the case of *John E. Humes, Bob Dombroff et al and Sailors' Union of the Pacific v. Alaska Steamship Company,* No. 2192, which ordered appellant to withhold the Alaska income tax from the wages of its seamen and to place the amount so withheld in a special fund, subject to the order of that court, and which enjoined appellant from paying any portion thereof over to appellee as Tax Commissioner of the Territory of Alaska (R. 10). Subsequently, on April 4, 1949, that court issued a supplemental order in the *Humes* case which extended the original injunction to the Act of March 26, 1949 (chapter 115, Session Laws of Alaska, 1949) (R. 24).

Confronted with the demand of appellee for payment of the withholding tax and the injunction restraining such payment with respect to the Sailors' Union members, appellant brought this action to test the validity of the Act, including the withholding requirements. In a preliminary injunction issued on April 28, 1949, the court enjoined defendant from collecting any withholding taxes from appellant and ordered the appellant to withhold the required amount of income taxes from the wages of its Alaska resident shore employees and pay the same into court pending further order of the court (R. 42). For the first quarter, 1949, the amounts withheld and paid into the Washington and Alaska special funds were $7,399.75 and $2,319.96 respectively (R. 87, 91).

Thereafter, trial was had on May 5, 1949, at which time plaintiff introduced evidence and testimony in support of its complaint and defendant introduced none (R. 82-96). On June 24, 1949, the court issued an opinion holding that the Act of March 26, 1949 (chapter 115, Session Laws of Alaska, 1949) was valid in its entirety, except (1) that the term "continental shelf" as used in section 5-B(1) was too indefinite to be given effect, but that pursuant to the severability clause of section 15 it could be eliminated without affecting the remainder of the Act, and, (2) that the Extraordinary Session of the legislature was invalid because not authorized by law, but that everything done or required to be done by the Act of January 22, 1949, was validated by section 16 of the Act of March 26, 1949 (R. 44-60).

Findings of fact and conclusions of law were filed

in accordance with the court's opinion (R. 61-67), and on July 8, 1949, a judgment and decree was entered sustaining the validity of the Act with the exceptions noted, and vacating the preliminary injunction and dismissing plaintiff's complaint (R. 68). This appeal followed (R. 70).

SUMMARY OF ARGUMENT

I.

The wages of seamen and vessel personnel are not subject to withholding of income taxes imposed by state or local law. *A fortiori* they are not subject to such withholding imposed by territorial law. *American-Hawaiian Steamship Company v. Fisher,* 89 F. Supp. 193 (1949). Cf. *Calmar Steamship Co. v. Taylor,* 303 U. S. 525 (1938); *Shilman v. U. S.,* 164 F. 2d 649 (1948).

II.

The Alaska Net Income Tax Act purports to impose an income tax upon both residents, and, nonresidents deriving income from Alaska sources, the tax to be computed at the rate of 10% of the taxpayer's Federal income tax or withholding tax. Certain allocation features are provided and withholding is required with respect to the wages of all persons having no other income from Alaska sources. Detailed administrative provisions for the collection, refunding and determination of taxes and of tax controversies are included. The question presented by this part of the appeal is, therefore, whether any of the provisions of the Act are invalid, and if so, whether such invalidity affects the Act as a whole.

A. The Act incorporates by reference the Internal Revenue Code (Act of Feb. 10, 1939, c. 2, 53 Stat. 1, 26 U. S. C. A., §1, *et seq.*) and various regulations of the Commissioner of Internal Revenue "as now in effect *or hereafter amended.*" (Italics supplied.) This is an attempted delegation of legislative authority to Congress and to the Commissioner of Internal Revenue which renders the entire Act invalid. *State v. Webber,* 125 Me. 319, 133 A. 738 (1926); *Florida Industrial Commission v. State,* 155 Fla. 772, 21 So. 2d 599 (1945); *State v. Intoxicating Liquors,* 121 Me. 438, 117 A. 588 (1922); Cf. *Panama Refining Co. v. Ryan,* 293 U. S. 388 (1934).

B. The Organic Act for Alaska (Act of Aug. 24, 1912, c. 387, §1, 37 Stat. 512, 48 U. S. C. A., §21 *et seq.*) requires that "all taxes shall be uniform upon the same class of subjects"; the Fourteenth Amendment of the Federal Constitution guarantees to all persons due process and the equal protection of the laws; and the Civil Rights Act (Act of May 31, 1870, c. 114, §16, 116 Stat. 144, 8 U. S. C. A., §41) similarly provides that all persons within the jurisdiction of the United States, "in every State and Territory," shall be subject to "like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." The Alaska Act results in inequalities and discriminations which violate each of these limitations.

C. Although a fairly wide latitude is permitted a legislature in classifying persons for purposes of taxation, where such classifications are arbitrary or unreasonable the statute is invalid. *Toomer v. Witsell,*

333 U. S. 848 (1948); *Colgate v. Harvey,* 296 U. S. 404 (1935); *Madden v. Kentucky,* 309 U. S. 83 (1940). In classifying, both for the purpose of the withholding tax and the direct tax, the allocation formulae discriminate in favor of one as against another of the same class without substantial basis. Such discriminations make the Act invalid. *Toomer v. Witsell, supra; F. S. Royster Guano Co. v. Virginia,* 253 U. S. 412 (1919). By the same allocation formulae the Act seeks to tax income of nonresidents and foreign corporations derived from sources beyond the taxing jurisdiction of the Territory.

D. The Act makes payment of the tax a condition to carrying on interstate commerce and is for that reason invalid. *Memphis Natural Gas Co. v. Stone,* 335 U. S. 80 (1948); *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 1131 (1920).

E. Section 7-D of the Act attempts to delegate to the Tax Commissioner certain authority to prescribe statutes of limitations and to make other determinations which are strictly legislative or judicial in character and not subject to delegation. *Schechter Poultry Corp. v. U. S.,* 295 U. S. 495 (1934).

F. Certain basic terms used in the Act are not defined and are so vague and indefinite that the Act cannot be given effect. *State v. Humble Pipe Line Co.,* 112 Tex. 375, 247 S. W. 1082 (1923).

III.

Where parts of a statute are inseparably connected with each other the invalidity of one part makes the entire statute invalid. The Alaska Act is an integrated taxing statute and the invalidity of any one or more

of the parts makes the Act void. 59 C. J. 641, fn. 15, Cf. *Pollock v. Farmers Loan & Trust Co.,* 157 U. S. 429 (1894).

IV.

The Act of March 26, 1949, purporting to repeal the Act of January 22, 1949, and to ratify and confirm the withholdings of income taxes made pursuant to the latter Act did not, as a matter of law, validate the taxes so withheld. The session of the legislature which enacted the Act of January 22, 1949, having been declared invalid its actions were void and in legal effect as if no such action had ever been taken. Such invalid action cannot be preserved by reference in a statute subsequently enacted at the regular session of the legislature.

V.

The court having properly assumed jurisdiction of the cause should observe the settled rule of equity and determine all questions which are material to the controversy and necessary to afford complete relief. *Allen v. Regents of the University System of Georgia,* 304 U. S. 439 (1938); *Alexander v. Hillman,* 296 U. S. 222 (1935).

ARGUMENT

Appellant's position is that the Alaska Net Income Tax Act is invalid as applied to its employees, whether seamen or shore workers, and cannot, therefore, furnish any basis for requiring appellant to withhold and pay over income taxes from the wages of those employees. As to appellant's shore workers it is submitted that if the Act is invalid for any reason it is

a complete defense to appellee's demand for payment of the withholding tax. An additional ground is available to appellant for resisting payment of the withholding tax on the wages of its seamen. *American-Hawaiian Steamship Company v. Fisher, supra.* The court having properly assumed jurisdiction of the cause should observe the settled rule of equity and determine all questions which are material to the controversy and necessary to afford complete relief. *Allen v. Regents of the University System of Georgia, supra; Alexander v. Hillman, supra.* There are several reasons why the Act is invalid and these will be discussed separately.

I.

THE WITHHOLDING TAX PROVISIONS OF CHAPTER 115, SESSION LAWS OF ALASKA, 1949, ARE INVALID AS APPLIED TO SEAMEN.

Section 5-B of the Act, like the same section of the original Act of January 22, 1949, imposed upon each seaman employed by appellant in the Alaska trade a tax equal to 10% of the tax deducted and withheld for Federal income tax purposes, and together with section 8 of the Act requires appellant to withhold such amounts from wages payable to its seamen and pay them over to appellee upon a quarterly basis. In this respect the Act is clearly invalid.

Section 3 of the Organic Act for Alaska provides that the Constitution of the United States and all laws thereof which are not locally inapplicable, shall have the same force and effect within the Territory as elsewhere in the United States. This definitely fixes the Federal Constitution as the Constitution for

the Territory of Alaska and requires that all laws enacted by the Territorial legislature shall be tested against that Constitution in determining their validity. *Haavik v. Alaska Packers Association,* 263 U. S. 510 (1923).

In addition, however, the Organic Act itself provides numerous limitations upon the legislative powers of the Territory with the result that the validity of any act of the legislature must also be tested against the Organic Act, as amended, as well as against the Federal Constitution. *Haavik v. Alaska Packers Association, supra.*

Also, the acts of the Territorial legislature must be tested against the aggregate of Congressional enactments to determine whether or not they are in such conflict with Acts of Congress as to be necessarily invalid for that reason. *Auk Bay Salmon Co. v. U. S.,* 300 Fed. 907 (1924).

In the Act of June 7, 1872, c. 322, §32, 17 Stat. 268, as amended, Title 46 U. S. C. A. §591-605, §682-685, Congress has adopted a comprehensive code of laws covering seamen's wages, including permissible deductions therefrom, and in so doing has completely occupied the field of deductions with the result that there remains to the states and territories no area of legislation in this respect. As the court said in the *American-Hawaiian Steamship Company* case:

> "46 U. S. C. A. § 591-605, §682-685, are laws of the United States enacted pursuant to Article III, Section 2, Clause 1 and Article I, Section 8, Clause 3 of the Constitution of the United States and prescribe the manner in which the wages of

seamen shall be paid by employers and specify that no deductions shall be made from the wages of seamen except as authorized by Federal law. Said provisions are laws of the United States enacted under and pursuant to the Constitution as aforesaid to provide a uniform system of law with respect to the wages of seamen. In particular, 46 U. S. C. A. §601, prohibits the attachment of the wages of seamen and provides that every payment of wages to a seaman shall be valid, notwithstanding any previous sale or assignment thereof or any attachment, encumbrance or arrestment thereon. Said provisions of the laws of the United States are the supreme law of the land pursuant to Clause 2, Article VI of the Constitution of the United States."

In that case the court held that the withholding tax requirement of the Oregon income tax law, as applied to seamen, was in operation and effect an attachment of the wages of the seamen contrary to 46 U. S. C. A. §601, and, accordingly, that the withholding tax requirement could not be enforced against seamen. Other cases furnish strong support for this view. *Calmar Steamship Co. v. Taylor, supra; Shilman v. U. S., supra.* And in any event it must be recognized that Congress, in the interests of uniformity, has preempted the field of deductions from seamen's wages and that only Congress can authorize deductions for income tax purposes. That Congress has not done so may not be urged as a reason for permitting states and territories to so legislate. Doubtless Congress is fully aware of the undesirable consequences which would flow from authorizing every

state and territory in which seamen perform any services to impose tax withholding requirements upon their wages. Here, absence of express consent by Congress is fatal to the attempt of the Territory to require withholding by appellant. *Napier v. Atlantic Coast Line R. Co.,* 272 U. S. 605 (1926); *LaCrosse Telephone Co. v. Wisconsin Unemp. Board,* 336 U. S. 18 (1949).

II.

CHAPTER 115, SESSION LAWS OF ALASKA, 1949, IS INVALID IN ITS ENTIRETY AND THEREFORE NECESSARILY INVALID AS TO SEAMEN.

A. The Act Is Invalid Because it Attempts to Delegate Legislative Functions.

Section 3-A(8) of the Alaska Net Income Tax Act defines the words "Internal Revenue Code" to mean "The Internal Revenue Code of the United States (53 Stat. 1) as amended *or hereafter amended.*" Section 3-B(1) provides that "Whenever the Internal Revenue Code is mentioned in this Act, the particular portions or provisions thereof, as now in effect *or hereafter amended,* which are referred to, shall be regarded as incorporated in this Act by such reference and shall have effect as though fully set forth herein," and Section 3-B(2) states that "Whenever any portion of the Internal Revenue Code incorporated by reference as provided in Paragraph (1) of this subsection refers to rules and regulations promulgated by the United States Commissioner of Internal Revenue, *or hereafter so promulgated,* they shall be regarded as regulations promulgated by the Tax Commissioner under and in accord with the pro-

visions of this Act, unless and until the Tax Commissioner promulgates specific regulations in lieu thereof conformable with this Act." (Italics supplied.)

Section 5 of the statute imposes two distinct and separate taxes. The first, imposed by section 5-A is levied upon the aggregate of all individuals, fiduciaries, corporations and banks with the exception of employees having no income from sources within Alaska other than wages or salary. Such employees are subjected to tax by section 5-B to which reference has previously been made.

Both of the taxes imposed by Section 5 of the Act are expressed in terms of a percentage of the income tax shown upon the taxpayer's Federal return in the first instance. Section 7, Act. That is the starting point in the computation of the Alaska tax. However, Section 5, imposing the taxes, expressly states that the tax shall be 10% of the total Federal income tax (or an allocated portion thereof) payable for the same taxable year under the provisions of the Internal Revenue Code.

Bearing in mind the definition of "Internal Revenue Code" quoted above Section 5 in its entirety is clearly invalid as an attempt to delegate functions which are exclusively those of the legislature and which cannot validly be delegated to any other body. Thus, it has been held that a state income tax law imposing a tax equal to 33 1/3% of the Federal income tax imposed by the United States Income Tax Act of November 23, 1921, and acts amendatory thereto *"which have been passed and approved prior to the time of the approval of this act,"* does not con-

stitute an invalid attempt at legislative delegation because the measuring stick incorporated into the state income tax law by reference was a fixed and known measure at the time the state law was enacted. (Italics supplied) *Santee Mills v. Query,* 122 S. C. 158, 115 S. E. 202 (1922). The opinion of the court shows that the statute would have been invalid if it had embraced future amendments to the Federal income tax law because it would then have delegated to Congress the function of determining the income tax law of the state. To the same effect, see *Featherstone v. Norman,* 170 Ga. 370, 153 S. E. 58 (1930). Other cases holding invalid any attempt to incorporate by reference future revisions or enactments by Congress, but involving subjects other than taxation, are *State v. Intoxicating Liquors,* 121 Me. 438, 117 A. 588 (1922); *State v. Webber,* 125 Me. 319, 133 A. 738 (1926); and *Florida Industrial Commission v. State,* 155 Fla. 772, 21 So. 2d 599 (1945).[1] Cf. 11 Am. Jur. sec. 219.

The court apparently believed that the attempted incorporation by reference of the Internal Revenue Code and the Commissioners' regulations "as hereafter amended" did not constitute an attempt to dele-

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[1] *State v. Intoxicating Liquors; State v. Weber:*

These cases involved prohibition laws enacted by the legislature of the state of Maine just prior to the Volstead Act. In the first case the Maine statute provided that intoxicating liquor should constitute "any beverage containing a percentage of alcohol, which by federal enactment * * * now or hereafter declared, renders a beverage intoxicating." The second case reaffirmed the holding in the first case that the attempt to delegate was invalid.

Florida Industrial Commission v. State:

This case invloved an attempt by the Florida legislature to incorporate by reference future acts of Congress affecting labor relations. The attempt to so delegate was held invalid.

gate legislative functions although frankly conceding that the cases cited by plaintiff supported its contention. (R. 52). We think there are no cases to be found to the contrary. *Ex parte Lasswell,* 1 Cal. App. 2d. 183, 36 P. 2d 678 (1934) cited by the Court (R. 53) as authority for the validity of the attempted delegation is, upon analysis, quite obviously in accord with all of the other cases dealing with this question. In that case the court found that the California Recovery Act by adopting the National Recovery Act for the State of California had established a primary standard and held that the further provision making the codes adopted by the Federal authorities become automatically the California codes did not constitute an invalid attempt to delegate legislative functions. The discussion of the question by that court makes it abundantly clear that it would have held invalid such attempted delegations as those involved in the present appeal.

The further comment by the court below (R 53) that plaintiff cannot avail itself of the objection of delegation because it was not shown that there had been any amendment of either Federal law or regulations since the enactment of the Act flies directly in the face of the decided cases above cited. It is the attempt to delegate that makes the Act invalid. *Panama Refining Co. v. Ryan,* 293 U. S. 388 (1934); *Smithburger v. Banning,* 129 Neb. 651, 262 N. W. 492 (1935). The latter case involves the precise point and the court held that the validity of the law did not depend on what had been done under it, but upon what the act purported to authorize. Moreover, it involved

a state statute which attempted to incorporate by reference future acts of Congress, and the statute was held to be invalid for that reason. As the court said in *State v. Intoxicating Liquors,* supra, "such legislation constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws. The authorities are so unanimous on the question that extended citation is unnecessary."

B. The Act Is Invalid Because it Fails to Provide the Uniformity and Equality Demanded by the Organic Act, the Fourteenth Amendment and the Civil Rights Act.

Tax laws enacted by territorial legislatures are subject to a good many limitations, some of which are found in the Federal Constitution and some in acts of Congress. The impression which seems to have grown up in some quarters that a territorial legislature is free to legislate as it sees fit without regard to such limitations and restricted only by what it deems to be expedient, rests upon a complete misconception of the basic laws under which territorial governments function. Thus, section 9 of the Organic Act requiring that "all taxes shall be uniform upon the same class of subjects," the due process and equal protection clauses of the Fourteenth amendment and the guaranties of the Civil Rights Act are all limitations upon the taxing power of the Alaska legislature. *Auk Bay Salmon Co. v. U. S.,* supra.

Two cases are cited by the court for the proposition that the Fourteenth amendment does not apply to territories. *South Puerto Rico Sugar Co. v. Buscaglia,* 154 F. 2d 96 (1946); *Anderson v. Scholes,* 83 F. Supp.

681 (1949)[2]. The first case cites no authority for its conclusion and the second one relies upon cases involving unorganized territories having no local legislatures. On the other hand, this Court has recognized without discussion that the amendment is a limitation upon the legislative powers of an organized territory. *W. C. Peacock & Co. v. Pratt,* 121 F. 772 (1903). Cf. *Johnson v. Kennecott Copper Corp.,* 5 Alaska 571 (1916).

That organized territories, aspiring to statehood, and engaged in the structure of fiscal programs to facilitate the achievement of that objective should be subject to at least the same limitations in the exercise of the taxing power as states only makes common sense. Congress recognized this fact at an early date. In reenacting the Civil Rights Act immediately after the adoption of the Fourteenth Amendment Congress expressly extended its limitations to territories. 8 U. S. C. A. § 41. That statute provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like pun-

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[2] *South Puerto Rico Sugar Co. v. Buscaglia:*

This case involved a statute imposing a higher income tax on foreign corporations than upon domestic corporations. The statute was held to be valid.

Anderson v. Scholes:

This case involved a territorial statute providing for service of process upon non-residents. The statute was held invalid under the Fifth Amendment and the privileges and immunities clause of Article IV, §2, Federal Constitution.

ishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The decisions in cases arising under the Civil Rights Act are unanimous in the view that it extends to all persons in every state and territory at least all of the protections guaranteed by the Fourteenth Amendment. In *County of San Mateo v. Southern Pacific Railway Co.,* 13 F. 145 (1882) Judge Field said:

> "Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed be classified, and different kinds be subjected to different rates. Real property may be taxed at one rate and personal property at another. Property in particular places may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount according to the calling or business for which they are exacted. But arbitrary distinctions not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is

> the constitutional rule as applied to the property of individuals, where it is subject to taxation at all; and this imports that an uniform mode shall be followed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed, according to the nature or position of the property. All state action, constitutional or legislative, impinging upon the enforcement of this rule, must give way before it. Congress, in its legislation since the adoption of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 congress re-enacted the civil-rights act; and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pains, and penalties, it added; and be subject only to like *'taxes, licenses, and exactions of every kind, and to no other.'* Rev. St. § 1977."

Accord: *Kentucky v. Powers,* 139 F. 452 (1905); *Murphy v. Ramsey,* 114 U. S. 15 (1885) (involving inhabitants of territories and recognizing the equal application of the statute to territories); *Strauder v. West Virginia,* 100 U. S. 303 (1879); *Holden v. Hardy,* 169 U. S. 366 (1897); *Hurd v. Hodge,* 334 U. S. 24 (1948).

Indeed, it may well be urged that the broad language of that statute effects a greater restriction upon the taxing power than does the amendment. Cf. *Takahashi v. Fish & Game Commission,* 333 U. S. 854 (1948). Apparently this statute was completely over-

looked in the *South Puerto Rico Sugar Co.* and *Anderson* cases.[3]

Measured by these limitations the Alaska Act cannot stand. To begin with, the Act is invalid because the legislature had no authority to enact a graduated net income tax law. The requirement of uniformity contained in the Organic Act is analogous to the equality and uniformity provisions of state constitutions. 51 Am. Jur. sec. 62. Against such requirements state graduated net income tax laws have been held invalid because they failed to achieve uniformity. *Bachrach, et al. v. Nelson, et al.,* 349 Ill. 579, 182 N. E. 909 (1932); *Kelley v. Kalodener,* 320 Penn. 180, 181 A. 598 (1935); *Culliton v. Chase,* 174 Wash. 363, 25 P. 2d 81 (1933); *Jensen v. Henneford,* 185 Wash. 209, 53 P. 2d 607 (1936); *In Re Opinion of Justices,* 266 Mass. 583, 165 N. E. 900 (1929). These cases hold that income taxes are taxes upon property and that regardless of the theoretical merits of a graduated net income tax law it is impossible to achieve uniformity in such a law. In *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429 (1894) the court also held that a net income tax is a tax upon property and there is nothing in subsequent decisions of the court modifying or weakening that view.

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3 Of course, the Fifth Amendment also applies to territorial legislation and, for the purposes of the challenge made to the validity of the Alaska Act in this brief, the due process clause of that amendment imposes substantially the same limitations as the Fourteenth Amendment. And as the court spelled it out in *Anderson v. Scholes, supra,* since the Fifth amendment and the privileges and immunities clause of Article IV, §2 are both applicable to enactments by the territorial legislatures, the net result is to impose limitations which include all of the area covered by the Fourteenth amendment.

The device of making the Alaska tax a flat percentage of the Federal income tax does not cure this defect because the latter is itself a graduated net income tax.

There is, however, still another ground upon which the Alaska Act violates the uniformity and equality requirements of the Organic Act, the Fourteenth amendment and the Civil Rights Act. This ground is one which appears from the face of the Act and which, therefore, the court may appropriately consider in an action testing the validity of the statute as a whole. Attention is again invited to the fact that if the Alaska Act is invalid for any reason then it is necessarily invalid with respect to the withholding requirements and appellant is, therefore, directly affected in this case by anything which is determinative of the validity of the Act. Appellant's position is neither hypothetical nor speculative when confronted with an injunction on the one hand and a demand for payment on the other. (R. 88, 91, 92)

Against this background it is submitted that the Act is invalid because it fails to take into account the fact that many taxpayers had unused net operating loss deductions under section 122 of the Internal Revenue Code for the years 1947 or 1948 which they are privileged to carry forward to their 1949 Federal income tax computation, and which when carried forward will wipe out their entire Federal net income and income tax for 1949 although they actually realize very substantial net income for that year. Compared with taxpayers having no net operating losses for these earlier years there is a complete failure of uniform-

ity and equality so far as the Alaska Act is concerned. Stated differently, the Alaska Act cannot possibly achieve uniformity and equality among taxpayers now for the first time subjected to tax by it because no adjustment is provided for eliminating the effect of the unused net operating loss carry-over provision of the Internal Revenue Code which relates to facts and circumstances occurring long prior to the effective date of the Act.

A similar result follows from the effect of the unused capital loss carry-over provided for by section 117 of the Internal Revenue Code.

Discriminations of this kind in favor of one as against another of the same class are not permitted under such requirements of uniformity and equality and state income tax laws which provide for or result in such forbidden discriminations have been held invalid. *F. S. Royster Guano Co. v. Virginia,* 253 U. S. 412 (1919); *Colgate v. Harvey,* 296 U. S. 404 (1935); *Madden v. Kentucky,* 309 U. S. 83 (1940); *Montgomery Ward & Co. v. Tax Commission,* 151 Kan. 159, 98 P. 2d 143 (1940). Cf. *Foster v. Pryor,* 189 U. S. 325 (1902); *Kentucky Union Co. v. Kentucky,* 219 U. S. 140 (1910); *Hillsborough v. Cromwell,* 326 U. S. 620 (1945).

In determining whether a taxing statute satisfies such requirements the courts look to the incidence of the tax and its practical operation. *International Harvester Co. v. Wisconsin,* 322 U. S. 435 (1943).

C. The Act Is Invalid Because it Creates Arbitrary and Unreasonable Classifications and Attempts to Tax Income Beyond the Taxing Jurisdiction of the Territory.

The Act of January 22, 1949 attempted to impose

a tax of 10% on the entire Federal income tax withholding of all employees, whether resident or nonresident, whose only income from Alaska sources was wages or salaries. No allocation provision of any kind was included for nonresidents who might have some, but not all, of their wages or salary from Alaska sources. Recognizing this defect in the law with respect to vessel personnel of interstate or foreign carriers engaged in the Alaska trade and with respect to the personnel of carriers operating vehicles or airplanes, the Act of March 26, 1949 amended Section 5-B of the original Act by including an allocation provision for these employees.

The effect of this amendment is to provide one basis for determining the amount of tax required to be withheld from the wages of appellant's vessel personnel and an entirely different basis for withholding from the wages of its other employees, nonresidents of the Territory, who also perform services for appellant both within and without the Territory. Moreover, in the case of carriers operating vehicles or airplanes, the allocation provision is in terms applicable to all personnel including, but not restricted to, the crews of such airplanes or vehicles, thus effecting still another classification for the purposes of the withholding tax.

We think it requires no extended discussion to make clear the fact that there is no basis whatever for classifying appellant's vessel personnel one way and its other nonresident employees a different way and employees of land and air carriers still another way in

determining the amount of withholding tax to be deducted from their wages. The effect of the Act is to create arbitrary and unreasonable classifications based upon no real differences since, from any point of view, all employees of appellant and all employees of all taxpayers who are nonresidents of the Territory may properly be taxed only with respect to an allocated portion of their Federal withholding tax. *F. S. Royster Guano Co. v. Virginia,* supra; *Colgate v. Harvey,* supra; *International Harvester Co. v. Wisconsin,* supra; *Montgomery Ward & Co. v. Tax Commission,* supra.

Moreover, the failure to provide an allocation formula for employees other than vessel personnel and personnel of land and air carriers results in imposing a tax upon wages or salary of other nonresident employees which is derived from sources outside the Territory and which is, therefore, not subject to the taxing jurisdiction of the Territory. This result constitutes a violation of the Fifth and Fourteenth amendments as well as the uniformity requirement of the Organic Act and the limitations contained in the Civil Rights Act. It is axiomatic that where no jurisdiction to tax exists any attempt to tax is invalid. *Hans Rees' Sons v. North Carolina,* 283 U. S. 123 (1930); *Piedmont & N. R. Co. v. Query,* 56 F. 2d 172 (1932); *Hart v. Tax Commissioner,* 240 Mass. 37, 132 N. E. 621 (1921); 90 A.L.R. 486. Cf. *Spector Motor Service, Inc. v. Walsh,* 139 F. 2d 809 (1944).

Section 5-A of the Act also attempts to effect a classification of taxpayers which is arbitrary and discriminatory and, as in the case of the withholding tax, to

tax income which is outside the taxing jurisdiction of the Territory. This subsection imposes a tax of 10% of a taxpayer's total Federal income tax, or, in the alternative a tax of 10% of an allocated portion of a taxpayer's total Federal income tax, whichever is less. Of course, in the case of many taxpayers no allocation will be available because all of their income will be exclusively from sources within the Territory.

The allocation formula provided by this subsection ascribes to the Territory that portion of the total Federal income tax that gross receipts derived from sources within the Territory, payroll and value of tangible property located in the Territory, bears to the total gross receipts from sources within and without the Territory, payroll and value of tangible property within and without the Territory. As so constituted we think the allocation formula is a valid one, having received wide recognition elsewhere. *Spector Motor Service, Inc. v. Walsh,* supra. But the subsection does not leave it at that. It goes on to provide that for the purposes of the allocation formula gross receipts from sources within the Territory shall include "income received or derived from sales wherever made of goods, wares and merchandise manufactured or originating in the Territory." For purposes of illustration, the effect of this definition of gross receipts will be to require the inclusion of the entire proceeds from the ultimate sale of the Alaska salmon pack and from Alaska mining operations in gross receipts from Territorial sources in the application of the allocation formula without regard to the extent to which such proceeds are actually derived from Ter-

ritorial sources, as distinguished from activities carried on outside the Territory which contribute to the realization of such proceeds. No such rule is provided for industries other than the manufacturing and extractive industries with the consequence that the latter are classified differently, and very much to their detriment, from other taxpayers. This arbitrary discrimination appears from the face of the statute and, upon the authority of the cases previously cited requires a holding that the statute is invalid. No conceivable basis exists for such a discrimination and the statute suggests none. The Supreme Court has only recently taken occasion to again point out that where no basis for such discriminations are to be found in a statute they cannot be upheld. *Toomer v. Witsell,* supra.

Again, the definition of gross receipts will, in practical operation, impose a tax upon income from sources outside the Territory and beyond the taxing jurisdiction of the Territory.

D. The Act Is Invalid as a Burden on Interstate Commerce.

The commerce clause of the Federal Constitution is a limtiation upon the power of the Territory to enact taxing laws. *Territory of Alaska v. Sears Roebuck & Co.,* 79 F. Supp. 668 (1947).

In recent decisions the Supreme Court has carefully announced the principles which are applicable in cases where the validity of tax legislation is challenged as a violation of that limitation. In *Memphis Natural Gas Co. v. Stone,* 335 U. S. 80 (1948) the Court stated that "a state tax upon a corporation doing only an interstate business may be invalid under our deci-

sions because levied (1) upon the privilege of doing interstate business within the state, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself." As applied to appellant and to all other taxpayers engaged exclusively, or practically so, in interstate commerce the Alaska Act is invalid under this rule. For example, appellant's business is 94% interstate while that of the companies engaged in salmon packing is entirely interstate. *McComb v. Consolidated Fisheries Co.,* 174 F. 2d 74 (1949). Section 12-C of the Act provides for an automatic suspension of a taxpayer's license to do business in the Territory for failure to pay the income tax. This is, in practical effect, a tax upon the privilege of doing interstate business within the Territory, which may not validly be imposed. The fact that, in the case of appellant, 6% of its business consists of transportation between Alaska ports will not avoid the rule announced by the Supreme Court because (1) it is by comparison too slight to deprive appellant of the protection of the rule, and (2) even if regarded as a local event it is, nevertheless, so much a part of appellant's interstate business that the tax is in effect a tax upon the interstate business itself. Cf. *Atlantic and Pacific Telegraph Co. v. Philadelphia,* 190 U. S. 160 (1903); *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 1131 (1920).

E. The Attempted Delegation of Authority to the Tax Commissioner Is Invalid.

Section 7-D of the Act dealing with overpayment, credit and refund, authorizes the Tax Commissioner to credit or refund all overpayments of taxes, all taxes

erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that are found to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. It is also provided that the Tax Commissioner shall by means of rules and regulations specify the manner in which claims for credit or refund shall be made, prescribe limitations and give notice of allowance or disallowance. The subsection then provides that those rules and regulations shall be based upon the provisions of Sections 321 and 322 of the Internal Revenue Code insofar as such provisions are consistent with other provisions of the Alaska statute.

This attempt to delegate to the Tax Commissioner the authority and function of prescribing statutes of limitations and determining the manner in which claims for refunds shall be made, and whether taxes have been unjustly assessed or are excessive in amount or in any manner wrongfully collected is clearly invalid. It is exclusively the function of the legislature to provide statutes of limitations as well as the manner in which refund claims are to be made; and it is exclusively the function of the judiciary to determine the legality of tax assessments and collections.

Moreover, the same objections are applicable to the direction in the statute that the Commissioner shall determine the extent to which Sections 321 and 322 of the Internal Revenue Code are consistent with the Alaska income tax law. Such determinations are not an administrative function. *Terminal R. Ass'n of St. Louis v. U. S.*, 266 U. S. 17 (1924); *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1934); *Kansas*

City Southern Ry. v. U. S., 293 F. 8 (1923); *Acme, Inc. v. Besson,* 10 F. Supp. 1 (1935); *In re Mellea,* 5 F. 2d 687 (1925); *Capital City Gas Co. v. City of Des Moines,* 72 F. 818 (1896).

F. The Act Is Invalid for Indefiniteness and Uncertainty.

In challenging the validity of statutes it is a common practice to assert that they are invalid for indefiniteness and uncertainty. In the majority of such instances the assertion is largely, if not entirely, a formality and relatively few statutes have been condemned for this reason. Nevertheless, there are cases in which statutes have proved to be so indefinite and uncertain that they have been held invalid. The rule is strictly applied to taxing statutes, which must be certain, clear and unambiguous. *State v. Humble Pipe Line Co.,* 112 Tex. 375, 247 S. W. 1082 (1923); 59 C.J. p. 601.

The principal cause of indefiniteness and uncertainty in the Alaska Act is the incorporation by reference of future amendments and revisions of the Internal Revenue Code and of regulations promulgated by the Commissioner of Internal Revenue. Because of this feature of the Act it is impossible for taxpayers to know either at the effective date of the Act or at any subsequent date just what tax liability the statute imposes. A more appropriate case for the application of the rule condemning statutes for indefiniteness and uncertainty can scarcely be imagined. It is no answer to this objection that a taxpayer will ultimately know what his Federal income tax liability is for a given taxable year since what the rule against indefiniteness and uncertainty requires is that

the Alaska statute be definite and certain and not merely that it shall refer to something which has not yet happened but which may happen and which when it does happen may or may not be sufficiently definite and certain in itself.

Another example of indefiniteness and uncertainty in the statute is the use of the word "income" appearing as the first word of the second sentence of section 5-A(2)(a). Nowhere does the Act define "income" and it is, therefore, impossible to ascertain whether it refers to net income or gross income or gross receipts, all of which have in common usage been referred to as income. This makes computation of the tax uncertain.

III

THE SEVERABILITY CLAUSE WILL NOT SAVE THE ACT.

Section 15 of the Act contains the standard severability clause which provides that "if any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby." In the court below appellee urged that even if some provisions of the Act were invalid this clause would save the remainder of the Act.

There are two answers to that contention. First, the Act is invalid in so many respects, as we have shown, that even if the severability clause were applied there would remain a totally inoperative statute which could not possibly be administered as an income tax law. Second, where, as here, the parts of a statute are so inseparably connected with each other the in-

validity of one part makes the entire statute void. *Hill v. Wallace,* 259 U. S. 44 (1922); *Pollock v. Farmers Loan & Trust Co.,* supra.

No method exists by which the court can sever the invalid attempts to delegate legislative functions to Congress, the Commissioner of Internal Revenue and the Tax Commissioner from the remainder of the Act and preserve it. The attempted delegations are part and parcel of the very sections of the Act which impose the income taxes and they so permeate them that severance is impossible without remaking the statute into an entirely different law than the legislature enacted. Such is not a judicial function. *Iselin v. United States,* 270 U. S. 245 (1926); *L. P. Steuart & Bro. v. Bowles,* 322 U. S. 398 (1944). Moreover, even if the references to future amendments of the Internal Revenue Code and regulations of the Commissioner of Internal Revenue were severed from the Act there would follow a complete collapse of the law when any change is made in the Code or the regulations because the Alaska law would then be out of gear with the federal law and the tax could not be ascertained from the income tax returns and determinations made pursuant to that law. And in any event as soon as a change in the federal law or regulations occurs the Alaska statute must fall because there would no longer be any existing Internal Revenue Code or Commissioners regulations which were passed and approved prior to the enactment of the Alaska statute.

This Court may take judicial notice of the fact that the Internal Revenue Code and the Commissioners

regulations have been changed at least once each year for more than ten years.

The same considerations control such invalidities as the attempt to establish arbitrary and unreasonable classifications and to impose burdens on interstate commerce. And, of course, the most striking invalidity of all — the attempt to impose a graduated net income tax — clearly requires a determination that the Act fails in its entirety. *Pollock v. Farmers Loan & Trust Co.,* supra.

IV

WITHHOLDINGS MADE PURSUANT TO THE ACT OF JANUARY 22, 1949, WERE NOT VALIDATED BY THE ACT OF MARCH 26, 1949.

The court held that the Extraordinary Session of the legislature which enacted the original income tax law on January 22, 1949 was an unauthorized session. It was not, in the eyes of the law, a session of the legislature at all and it could not, therefore, take any action which either the regular session or the courts may recognize for any purpose. *Christoffel v. United States*—U. S.—October Term, 1948, No. 528; *Myers v. United States,* 171 F. 2d 800 (1948). As the Supreme Court said in the *Christoffel* case "a tribunal that is not competent is no tribunal." Accordingly, the attempt to preserve by reference action taken at the invalid session is ineffective and the court could not properly find that section 16 of the Act of March 26, 1949 required appellant to pay over income tax withheld pursuant to the Act of January 22, 1949. *Swanson v. Dolezal,* 114 Neb. 540, 208 N. W. 639 (1926); *Norton v. Shelby County,* 118 U. S. 425 (1886). In the *Norton* case the Court said:

" * * * An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

V

THE COURT HAVING PROPERLY ASSUMED JURISDICTION OF THE CAUSE SHOULD OBSERVE THE SETTLED RULE OF EQUITY AND DETERMINE ALL QUESTIONS WHICH ARE MATERIAL TO THE CONTROVERSY AND NECESSARY TO AFFORD COMPLETE RELIEF.

With respect to the withholding tax feature of the Alaska Act appellant is not the taxpayer but merely the withholding agency for the collection and payment of the tax which section 5-B imposes upon its employees. *Allen v. Regents of the University System of Georgia,* supra. As previously stated, appellant is enjoined by one court from payment of the tax withheld on seamen's wages and was so enjoined at the time the present case was heard and decided.

As an employer appellant conceives that it has a duty and responsibility to all of its employees to challenge the validity of the withholding tax where required by circumstances to challenge it as to some. Accordingly, since the withholding tax is necessarily invalid if either the withholding tax provision of the statute fails or if the statute is invalid in its entirety for any reason, appellant submits that under established rules of equity the court having once obtained jurisdiction of the controversy should determine all questions material to the determination of appellant's ultimate liability to pay over to the Territory the withheld tax. *Alexander v. Hillman,* supra. This in-

cludes all grounds of invalidity alleged by appellant which appear on or by necessary implication from the face of the statute. To do less would disregard the very purpose of equity jurisdiction — to mold and adjust its action so as to award substantial relief according to the requirements of the case. *Humboldt Savings Bank v. McCleverty,* 161 Cal. 285, 119 P. 82 (1911); *Bowen v. Hockley,* 71 F. 2d 781 (1934). It would also disregard the fundamental rule that equity does not do things by halves. Pomeroy's *Equity Jurisprudence,* 5th Ed., sec. 236a, citing many cases.

The court could not, therefore, properly dismiss appellant's contentions with respect to the validity of the allocation formula of section 5-A, or the failure to achieve equality and uniformity because of the absence of an adjustment for unused net operating losses and unused capital losses, on the ground that such questions were not before the court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted: (1) that the decree of the district court should be reversed to the extent that it holds that chapter 115, Session Laws of Alaska, 1949, is a valid Act; that the term "continental shelf" as used in section 5-B(1) thereof may be severed from the Act without affecting the remainder of the Act; and that section 16 of chapter 115, Session Laws of Alaska, 1949, ratified and confirmed the withholdings of income taxes made pursuant to chapter 3 of the Laws of the Extraordinary Session, Alaska, 1949, and (2) that the case should be remanded to the court for entry of a decree permanently enjoining appellee as prayed for in the original and supplemental complaints filed herein.

Respectfully.

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August, 1949.

APPENDIX A

Chapter 115, Session Laws of Alaska, 1949

* * *

Section 3. DEFINITIONS.

(8) The words "Internal Revenue Code" mean the Internal Revenue Code of the United States (53 Stat. 1) as amended or as hereafter amended.

* * *

B. REFERENCES TO INTERNAL REVENUE CODE.

(1) Whenever the Internal Revenue Code is mentioned in this Act, the particular portions or provisions thereof, as now in effect or hereafter amended, which are referred to, shall be regarded as incorporated in this Act by such reference and shall have effect as though fully set forth herein.

(2) Whenever any portion of the Internal Revenue Code incorporated by reference as provided in Paragraph (1) of this subsection refers to rules and regulations promulgated by the United States Commissioner of Internal Revenue, or hereafter so promulgated, they shall be regarded as regulations promulgated by the Tax Commissioner under and in accord with the provisions of this Act, unless and until the Tax Commissioner promulgates specific regulations in lieu thereof conformable with this Act.

* * *

Section 5. TAX ON INDIVIDUALS, FIDUCIARIES, CORPORATIONS AND BANKS.

A. GENERAL RULE. There is hereby levied and there shall be collected and paid for each taxable year upon the net income of every individual (except employees whose sole income in Alaska consists of wages or salary upon which tax has been withheld as referred to in subsection B of this Section), fiduciary, cor-

poration and bank, required to make a return and pay a tax under the Federal income tax law, a tax computed by either one of the following methods:

(1) a tax equal to 10 percent of the total income tax that would be payable for the same taxable year to the United States under the provisions of the Internal Revenue Code without the benefit of the deduction of the tax payable hereunder to the Territory.

(2) a tax equal to 10 percent of that portion of the total income tax that would be payable under the provisions of the Internal Revenue Code without the benefit of the deduction of tax payable hereunder to the Territory, that gross receipts derived from sources within the Territory, payroll and value of tangible property located in the Territory, bears to the total gross receipts from sources within and without the Territory, payroll and value of tangible property within and without the Territory.

(a) DETERMINATION OF GROSS RECEIPTS.

Gross receipts from sources within the Territory shall consist of interest, rents, royalties, gains, dividends, all other income and gross income received or derived in connection with property owned or a business or trade carried on and salaries, wages and fees for personal services performed within the Territory. Income received or derived from sales wherever made of goods, wares and merchandise manufactured or originating in the Territory shall be considered to be a part of gross receipts from sources within the Territory.

* * *

B. EMPLOYEES. There is hereby levied upon and there shall be collected from every employee (including persons referred to in subsection (C) of Section 1621 of the Internal Revenue Code) whose sole income in Alaska during the taxable year consists of

wages or salary, a tax in the amount of ten percent of the tax deducted and withheld under the provisions of subchapter (D), Chapter 9, of the Internal Revenue Code, which tax is to be withheld by the employer under the provisions of Section 8 of this Act. The word "employer" includes all Territorial departments, agencies and institutions and political subdivisions; Provided, that the foregoing language of this subsection shall not apply to Federal employees or others not subject to the withholding provisions of this Act, but such persons shall be liable under the general rule set forth in Section 5(A), and must file returns and make payment accordingly, and provided that any person under said withholding provisions whose sole income in Alaska consists of wages or salary, even though he be not required to file a return hereunder, may file such a return, if he so elects, for the purpose of getting his liability fixed in accordance with the rate of tax imposed by the general rule, and making claim for refund of any overpayment.

(1) The tax levied by this subsection shall apply to that portion of the voyage pay of vessel personnel of interstate carriers engaged in the Alaska trade which is earned in the waters of Alaska, including the waters over the continental shelf. The tax shall likewise apply to that portion of the pay earned in Alaska of the personnel of carriers operating vehicles or airplanes on land or in the air on routes to and from Alaska.

* * *

Section 8. COLLECTION OF INCOME TAX AT SOURCE.

* * *

B. REQUIREMENT OF WITHHOLDING. Every employer making payment of wages or salaries shall deduct and withhold a tax in the amount of 10 percent of the tax deducted and withheld under the

provisions of subchapter (D), Chapter 9 of the Internal Revenue Code. Every employer making a deduction and withholding as outlined above, shall furnish to the employee upon request a record of the amount of tax wihtheld from such employee on forms to be prescribed, prepared and furnished by the Tax Commissioner.

* * *

D. PAYMENT OF TAX WITHHELD. Every employer making payments of wages or salaries earned in Alaska, regardless of the place where such payment is made:

(1) shall be liable for the payment of the tax required to be deducted and withheld under this Section and shall not be liable to any individual for the amount of any such payment; and

(2) must make return of and pay to the Tax Commissioner quarterly, or at such other times as the Tax Commissioner may allow, the amount of tax levied which, under the provisions of this Act, he is required to deduct and withhold. Upon failure of the employer to comply with the provisions of this paragraph, the provisions of Section 11 of this Act shall apply.

* * *

Section 12. ENFORCEMENT.

* * *

C. SUSPENSION OF LICENSES. In addition to the other penalties imposed herein, any person authorized to conduct any business by virtue of a license duly issued to him under the laws of Alaska, whether he be a resident or not, shall, if he fails to pay the tax levied under Subsection (A), Section 5 of this Act, suffer suspension of his said license or licenses until the tax imposed by this Act, together with penalties, is paid in full.

* * *

APPENDIX B

Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512.

§23. CONSTITUTION AND LAWS OF THE UNITED STATES EXTENDED. The Constitution of the United States, and all of the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. * * *

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514

§78. SAME; TAXES TO BE UNIFORM; ASSESSMENTS. All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.